



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 1, 2009

CBCA 237-ISDA

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA,
AND SIUSLAW INDIANS,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Geoffrey D. Strommer of Hobbs, Straus, Dean & Walker, LLP, Portland, OR, counsel
for Appellant.

Jay Furtick, Office of General Counsel, Department of Health and Human Services,
Seattle, WA, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **STEEL**.

SOMERS, Board Judge.

The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (collectively the “Confederated Tribes”) provided health care services to their members under self-determination contracts with the Department of Health and Human Services (HHS), Indian Health Service (IHS). These contracts were entered into pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq.* (2006). In this appeal, the Confederated Tribes seek additional amounts of indirect contract support costs (CSC) funding from IHS under ISDA

contracts for fiscal year (FY) 1998.¹ IHS has moved for summary relief on the Confederated Tribes' FY 1998 claim, asserting that the Confederated Tribes have no statutory or contractual right to additional funding because providing such funding would have caused IHS to exceed the Congressional cap on CSC for FY 1998. The Confederated Tribes oppose and have cross-moved for summary relief. For the reasons set forth below, we grant the Government's motion for summary relief and deny the Confederated Tribes' motion.

Background

In 1975, Congress enacted the ISDA to promote tribal autonomy by permitting Indian tribes to manage federally-funded services that were previously administered by the Federal Government. *See* 25 U.S.C. § 450a; *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005). Transfers of federal programs to tribal control under the ISDA are accomplished through "self-determination contracts" under which a tribe agrees to take over administration of a federal program such as an IHS hospital or clinic. 25 U.S.C. § 450f(a). The Government is required to provide self-determination contractors with the same amount of funding that would have been appropriated for the tribal programs if IHS had continued to operate the programs directly. This amount is known as the "Secretarial amount" or "tribal share." 25 U.S.C. § 450j-1(a)(1).

Originally, the ISDA did not require the Government to pay the administrative costs that the tribes incurred to operate the programs. As a result, the tribes absorbed those costs, which reduced the funds available for the tribes to provide direct services to their members.

¹ Initially, the Confederated Tribes filed appeals on claims for FYs 1995-1998 (CBCA 171-ISDA and 235-ISDA through 237-ISDA). By decision dated July 28, 2008, the Board dismissed the FY 1996 and FY 1997 claims (CBCA 235-ISDA and 236-ISDA) for lack of subject matter jurisdiction because appellant failed to submit these claims to the awarding official within six years after they accrued, as required by the Contracts Disputes Act of 1978, 41 U.S.C. § 605(a). *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Department of Health and Human Services*, 08-2 BCA ¶33,922, at 167,867-68. The appellant appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. The Federal Circuit consolidated that appeal with other cases and issued a decision affirming in part, reversing in part, and remanding the cases. *Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, Nos. 2008-1532, et al. (Fed. Cir. Sept. 29, 2009).

Appeals on FYs 1995 and 1998 (CBCA 171-ISDA and 237-ISDA) are currently pending before the Board. This decision resolves the claim for FY 1998 (237-ISDA).

See Thompson v. Cherokee Nation of Oklahoma, 334 F.3d 1075, 1080 (Fed. Cir. 2003). Congress amended the ISDA in 1988 to require the Federal Government to provide funds to pay the administrative expenses of covered programs. Those expenses included “contract support costs,” defined in the statute as costs that a federal program would not have directly incurred, but that tribal organizations acting as contractors reasonably incur in managing the program. 25 U.S.C. § 450j-1(a)(2).

In addition, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-government “compacts,” with a select number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note, *repealed by* Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000). The selected tribes were given the option of entering into either contracts or compacts² with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a contract or a compact, they also entered into annual funding agreements (AFAs) as to the years covered by the instrument.

The provision of funds for CSC is “subject to the availability of appropriations,” notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

For FYs 1995 through 1998, Congress set aside \$7.5 million of IHS’s appropriated funds into the Indian Self-Determination (ISD) fund, which were to be used for the transitional costs of new or expanded tribal programs. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, tit. II, 108 Stat. 2499, 2528 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-12 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997). This funding, earmarked for new or expanded programs, was subsumed within the overall CSC cap. *Id.*; *see also* S. Rep. No. 105-56 at 96 (1997) (“The Committee recommends \$168,702,000 for contract support. This amount includes increases over the fiscal year 1997 enacted amount of \$7,500,000 for the Indian self-determination fund for new and expanded contracts and \$482,000 as a transfer from the “Facilities” account.”); H.R. Rep. No. 105-337, at 90 (1997) (Conf. Rep.) (“inserts language placing a cap of \$168,702,000 on contract support costs . . .”).

² For the purposes of this decision, there are no significant differences between contracts and compacts.

In July 1994, the Confederated Tribes submitted a proposal to the IHS Portland (Oregon) Area Office to assume responsibility for expanded health programs. IHS approved the proposal and the Confederated Tribes administered the programs from FY 1995 through FY 1998 and beyond. Amended Complaint ¶ 9. The Confederated Tribes assert that they have received no CSC for costs related to assuming new and expanded programs for FY 1995 or 1996. Amended Complaint ¶¶ 9, 10, 20.

The Confederated Tribes requested a contracting officer's final decision for unpaid CSC for FY 1998 in a letter dated September 27, 2004. Amended Complaint, Exhibit A.³ The Confederated Tribes sought \$90,794, including (1) \$69,563 in direct recurring CSC, adjusted for inflation at 1.24% and (2) \$21,231 (30.9%) in a percentage of indirect CSC owing from the IHS's failure to pay FY 1995 and 1996 ISD requests.⁴ In their original complaint, the Confederated Tribes sought \$143,736, including \$68,711 in direct CSC and \$75,025 in IDC. In their amended complaint, the Confederated Tribes assert the following:

(1) that the IHS breached the FY 1998 contract and violated the [ISDA] by failing to pay the full CSC associated with the PFSAs assumed in the FY 1995 LNF [Level of Need Funding] expansion and operated by the Confederated Tribes in FY 1998, and seeks \$56,393;

(2) that the IHS breached the FY 1998 contract and violated the [ISDA] by failing to pay the full CSC associated with the PFSAs assumed in the FY 1996 WOSU [Western Oregon Service Unit] expansion and operated by the Confederated Tribes in FY 1998, and seeks \$121,828, and

³ The Confederated Tribes submitted a supplemental request for a contracting officer's final decision by letter dated September 28, 2005. Appeal File, Exhibit I(b)(4). However, the Confederated Tribes did not reference the supplemental request in their December 15, 2005, notice of appeal or in their September 21, 2006, Amended Complaint.

⁴ The Confederated Tribes alleged that the non-payment of the FY 1995 and 1996 ISD requests reduced the amount of funds the Confederated Tribes received not just in that year but in every subsequent one (including FY 1998). Amended Complaint ¶ 24-26. Specifically, the Confederated Tribes contend that if their ISD requests had been paid when the Confederated Tribes had assumed the new and expanded programs, in FY 1995 and FY 1996, the "startup" component of the requests would have been paid in those years only.

(3) that the IHS breached the FY 1998 contract and violated the [ISDA] by failing to pay the full CSC associated with ongoing PFSAAs not assumed in FY 1995 or 1996, and seeks \$11,338, for a total claim of \$189,559 for FY 1998.

Amended Complaint ¶¶ 42-44.

With regard to funding, the contract, dated October 1, 1995, and applicable to FY 1998, stated:

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

Appeal File, Exhibit V1(a) at 4. The AFA for FY 1998 provided that payment shall be made on a lump sum basis, subject to the availability of FY 1998 appropriated funds, and specifically provided:

Section 6 -- Adjustment Due to Congressional Actions. The parties to this Annual Funding Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional action in Appropriations Act. Upon enactment of relevant Appropriations Acts or other law affecting availability of funds, including but not limited to Indian Health Care Service and Department of Health and Human Services, the amount will be adjusted as necessary and the Confederated Tribes will be notified pursuant an amendment (sic) to the AFA where there is an increase or decrease in the total available funding.

Appeal File, Exhibit VI(b) at 5.

The annual funding agreement for FY 1998 set forth the funding available for CSC. Pursuant to the agreement, IHS paid the Confederated Tribes a total of \$434,838 for CSC for FY 1998. Respondent's Statement of Uncontested Facts ¶ 9; Appellant's Statement of Uncontested Facts ¶ 5.

In our previous decision, we concluded based upon the record that Congress had restricted funds available for CSC for FY 1998. *Confederated Tribes*, 08-2 BCA ¶ 33,922, at 167,867-68. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions in the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1998 appropriation when it provided "not to exceed \$161,202,000 . . . for payments to tribes and tribal organizations for contract or grant support costs" Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997). No separate amount had been designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.*

However, because we could not determine based upon the record whether providing the Confederated Tribes with additional funding for CSC would have caused IHS to expend more than \$161,202,000 for CSC for FY 1998, we denied the IHS motion to dismiss the FY 1998 claim for failure to state a claim upon which relief can be granted. On this issue, we stated that if providing the Confederated Tribes with additional funding for CSC would have caused IHS to expend more than the funds appropriated for CSC for the FY 1998, the Confederated Tribes had no statutory or contractual right to such additional funding and their claim for additional funding would not be one upon which we could grant relief, citing *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); and *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided additional funding for CSC without expending more than \$161,202,000 for CSC for FY 1998, we concluded that the Confederated Tribes might be able to establish that they had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case their claim would be one upon which we could grant relief.

After the Board issued its decision, the parties agreed that IHS would supplement the appeal file with documentation addressing the issue of whether IHS could have provided additional funding for CSC without expending more than the amount appropriated for the fiscal year. Accordingly, IHS supplemented the record with the declaration of Elizabeth Fowler, the Director of the Office of Finance and Accounting (OFA) at IHS.

In her declaration, the Director stated that one of her responsibilities includes monitoring the obligation and expenditure of funds that Congress appropriates for IHS. Declaration of Elizabeth Fowler (Nov. 17, 2008) at 1. The Director explained that, since FY 1998, Congress included a "cap" in the annual IHS appropriations for CSC. The funds appropriated by Congress for CSC are "one-year" funds, meaning that the funds must be obligated before the end of the fiscal year in which they were appropriated. The funds remain available for five years after the close of the fiscal year for liquidation of obligations

incurred during that one fiscal year. After the expiration of that period, the funds are statutorily withdrawn. *Id.* at 2.

Each year, IHS allots its CSC funding among the twelve IHS area offices. Each area office obligates its CSC allotment to the tribes and tribal contractors in its area by incorporating the funding into annual funding agreements or modifications to self-governance contracts or compacts. IHS then records the obligations in its accounting system. At some point thereafter, the Department of the Treasury disburses the obligated funds. Fowler Declaration at 2.

Since 1998, IHS has obligated almost all of the funds appropriated by Congress for CSC. These funds have never been sufficient to satisfy all of the requests for CSC made by IHS's tribal contractors. Therefore, pursuant to published policies, IHS has divided the funding among the various contractors. Fowler Declaration at 3.

In FY 1998, there were apportioned to IHS, in a one-year account, \$161,202,000 for CSC for ongoing self-determination contracts and compacts. OFA records show that \$161,225,431 was obligated by the close of the fiscal year, leaving what appeared to be a negative unobligated balance of \$23,431. The negative balance at the end of FY 1998 resulted from a double obligation of \$36,528 to the Nashville Area Office for Cherokee Nation's location, which IHS corrected on October 30, 1998. The unobligated balance also included \$6939 from the Phoenix Area and \$3158 from the Oklahoma Area. Fowler Declaration at 3, Attachments C-H.

The balance in the account fluctuated over the next five years due to administrative recording errors, de-obligations, and refunds. The funds were statutorily withdrawn in September 2003. OFA records show that as of September 30, 2003, when the funds were statutorily withdrawn, the unobligated balance in the account was \$1,063,719. The unobligated balance included \$122,519 in the Phoenix area, \$3000 in the Nashville area, and \$938,200 at IHS headquarters. The balance of undelivered orders on September 30, 2003, was \$0. Fowler Declaration at 4, Attachment G-I.

Generally, unobligated funds at the end of the fiscal year occur for three reasons: (1) a de-obligation, in which IHS determines that the amount of an obligation not yet disbursed is in excess of the amount that actually should have been obligated; (2) a refund, in which IHS determines that the amount of an obligation that was disbursed was in excess of the amount that actually should have been obligated and disbursed, and IHS has thus recovered the funds, and (3) IHS never obligated the funds. Fowler Declaration at 5-6.

During this time period, an additional reason caused the amount of unobligated funds to fluctuate. As the result of a pending lawsuit, a United States district court ordered IHS to make payments into the court registry from various CSC accounts, including \$511,115.05 for FY 1998, to secure funding in the event that IHS did not prevail. However, IHS ultimately prevailed in the litigation, and on August 12, 2002, the court returned the funds to IHS. Also, an additional \$427,085 of the \$1,063,719 that was statutorily withdrawn in 2003 had been obligated for CSC for another contractor, pending ratification of its CSC requirement, but those funds remained undelivered in 2003 and were returned to the Treasury that year. Fowler Declaration at 6.

Discussion

Respondent initially filed a motion to dismiss in response to appellant's motion to amend its complaint. After the Board issued its July 28, 2008, decision discussed above, respondent filed an amended motion for summary relief, and appellant filed an opposition and cross-motion. As a result, each party has asked the Board to resolve this dispute by granting its own motion for summary relief and denying the opposing party's motion. Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The mere fact that the parties have cross-moved for summary relief does not impel a grant of one of the motions; each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

In the claim submitted to the contracting officer on September 27, 2004, the Confederated Tribes sought immediate payment of \$90,794 plus interest for unpaid contract support accrued during FY 1998, including (1) \$69,563 in direct recurring CSC and \$21,231 for indirect CSC. As noted above, the Confederated Tribes have recast the claim in the amended complaint and in the motions for summary relief. The Confederated Tribes accept for the sake of argument that the cap limits the amount that IHS could have paid in FY 1998, but argue that they still have a claim for recurring funding arising from underpayments of ISD funding for FYs 1995 through 1997, and that the funding related to ISD is not capped. Appellant's Response to Respondent's Motion to Dismiss and Reply to Respondent's Response to Appellant's Motion to Amend Complaint at 39-40.

“Unexpended funds’ are the portion of the appropriation that the agency did not spend during the fiscal year, including both obligated amounts that the agency had not yet disbursed, and unobligated amounts.” Government Accountability Office, *Principles of Federal Appropriations Law*, vol. I at 5-67 to -68; *see also* 31 U.S.C. § 1551(a). As is evident from the record, however, no unexpended funds remained in the fiscal year accounts with which we are concerned. Thus, in FY 1998, IHS obligated the entire \$203,781,000 that Congress appropriated for CSC, leaving nothing for additional obligations or expenditures. Once IHS fully obligated the amount appropriated by Congress for CSC, any additional obligation or expenditure would have caused IHS to exceed the Congressional cap, in violation of 31 U.S.C. § 1341(a)(1)(A). That statute prohibits an agency from making a disbursement or obligation that exceeds the amount appropriated by Congress.

However, even assuming that unexpended funds remained to pay the Confederated Tribes’ claim for additional CSC, the Confederated Tribes submitted the claim for these additional costs after the funds had been returned to the Treasury. Pursuant to 31 U.S.C. § 1552(a), “[o]n September 30 of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.” *See also City of Houston, Texas v. Department of Housing and Urban Development*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) (citing *West Virginia Association of Community Health Centers v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984)) (“[I]t is an elementary principle of the budget process that, in general, a federal agency’s budgetary authority lapses on the last day of the period for which the funds were obligated. At that point, the unobligated funds revert back into the general Treasury.”); *National Association of Regional Councils v. Costle*, 564 F.2d 583, 587 (D.C. Cir. 1977) (same); *Principles of Federal Appropriations Law*, vol. II, at 5-73 to -75.

The Confederated Tribes did not file the claim for additional contract support funds for FY 1998 until September 27, 2004, nearly one year after the appropriated funds had lapsed. Once the budget authority had lapsed, the agency properly returned the funds to the Treasury in compliance with statutory requirements, and no funds were available for any purpose.

The Confederated Tribes assert that their claim for CSC for FY 1998 encompasses both new and expanded and ongoing CSC, and state that the claim for new and expanded CSC (or the “queue” component of the claim) for FY 1998 is not subject to a cap. As noted above, however, the legislation and legislative history make plain that the funding for CSC earmarked for new and expanded funds was subsumed within the overall CSC cap. Congress restricted IHS’s FY 1998 appropriation when it provided “not to exceed \$161,202,000 . . . for payments to tribes and tribal organizations for contract or grant support costs”

Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997). No separate amount had been designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.*

Thus, the Confederated Tribes are entitled to be paid their full CSC requirement only as long as appropriations are legally available to do so. As explained above, the Confederated Tribes did not submit the claim for additional CSC until after the appropriations had lapsed. Once the appropriations lapsed, the funds were no longer available with which to pay any claims. Accordingly, for the same reasons that we grant the Government's motion for summary relief, we must deny the Confederated Tribes' motion.

Decision

For the foregoing reasons, respondent's motion for summary relief is granted, and appellant's motion for summary relief is denied. The appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

CANDIDA S. STEEL
Board Judge